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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1060

RICHARD ZALMANOWSKI,
DAVE FELDMAN,
KENNETH BAKER,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Richard Zalmanowski, Dave Feldman and Kenneth Baker respectfully request that this Court issue a Writ of Certiorari to review the judgment of the Court of Appeals entered on September 26, 1979, which upheld their convictions for engaging in unlawful gambling.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, whereby that court refused to suppress a portion of the evidence here at issue, is reported as *United States v. Giacalone*, 455 F.Supp. 26 (E.D. Mich. 1977). By unpublished opinion dated Aug. 19, 1977, the District Court refused to suppress additional evidence here at issue. The opinion of the Court of Appeals upholding the refusal to suppress appears as *United States v. Feldman*, 606 F.2d 673 (6th Cir. 1979). The appellate opinion is reproduced *infra* at 1a.

JURISDICTION

By order dated and entered December 6, 1979, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for rehearing en banc, thereby letting stand the Court's opinion, dated and entered September 26, 1979, affirming petitioners' conviction. This petition is timely. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") authorizes electronic interception of private conversations by means of a broadcasting unit lacking any shut-off capacity and broadcasting, non-stop for three and one half months, on radio waves accessible, within half a mile, to any member of the public in possession of a commonplace radio unit available in over-the-counter sales.

2. Whether Title III permits the admission of evidence gained by interception of communications on a telephone

not specifically authorized to be intercepted in the authorization order.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the United States Consittution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and he persons or things to be seized.

18 U.S.C. §2518:

Text appears *infra* at 21a.

STATEMENT OF THE CASE

1. The Car Bug

As part of a 1976 investigation of violations of federal gambling laws in the Detroit area, the F.B.I. sought and obtained a judicial order authorizing the placing of an electronic interception device in an automobile belonging to petitioner Zalmanowski. The order, and all subsequent orders authorizing the maintenance of the bug, expressly required that:

> [T]he oral [electronic eavesdropping] devices which are to be located in [petitioner Zalmanowski's automobile] shall be activated only when [given suspects] are determined by physical surveillance or voice identification to be present . . . inside this vehicle . . . . Once the oral devices are activated and conversations are intercepted the interception

---

[1] This second issue is raised by petitioners Feldman and Baker only.

shall continue only so long as [these suspects] are participants in those conversations. App. at 43.[2]

During the night of May 26, 1976, F.B.I. agent Robert Langford broke into petitioner Richard Zalmanowski's car and planted an electronic bug inside. The car, used as the Zalmanowski's family vehicle, was parked, at the time, in the driveway directly in front of the Zalmanowski home in Dearborn, Michigan, a Detroit suburb. (App. at 274-281).

The bug remained in the car until August 19, 1976, when Agent Langford broke in again to remove it. In that period, it broadcast to all within half a mile range, and in possession of a commonplace radio receiver available in over-the-counter sales, every single conversation or other sound emanating from the car. For the bug had no shut off capacity, and remained "on" during the entire period it was in the car. App. at 194. During about half of the thirteen weeks the bug remained in the car, there was no authorization order at all in effect. App. at 272-276.

The monitoring agents sought to fulfill the "minimization" requirements of Title III by turning off their receiving units when the appropriate suspects were not in the car, or when no order was in effect. The bug, of course, continued, however, to broadcast to the world. The government offered no justification at all for its installation of a non-stop bug instead of a remote control device.

Prior to trial petitioners moved to suppress the evidence resulting from the car bug, on the ground, *inter alia*, that the surveillance by means of a non-stop public broadcasting unit constituted an unconstitutional and

[2] References are to the Appendix filed in the Court of Appeals.

unlawful invasion of privacy. The District Court denied the motion, theorizing (1) that the monitoring officers' deactivation of their *receiving* units constituted compliance with the authorization order's requirement that the bug not be "activated" except when specified parties were in the car; (2) that because the speech of the car's occupants was broadcast indiscriminately *to the public*, there was no violation of the minimization requirement, such requirement being addressed (the court proposed) solely to the government agents; and (3) that a transmitter capable of being shut off was more likely to break down than a non-stop bug, and thus require additional intrusions into the car. There was no evidence presented regarding the rate of repair of remote control bugs in comparison to non-stop bugs; the court simply speculated about this matter

On appeal a divided panel of the Sixth Circuit affirmed, noting, *inter alia*, that petitioners had not affirmatively shown that anyone had in fact overheard anything broadcast from the car.[3]

2. The Telephone Tap

The initial 1976 interception order also granted authorization to intercept wire communications on six telephones, described by their telephone numbers. Included in this group of telephones were two telephones subscribed to by Kenneth and Dennis Bruno, "located at 17404 O'Connor, Allen Park, Michigan bearing telephone numbers 313-274-5281 and 313-565-8469, respec-

[3] Petitioners had appended two affidavits to their reply brief in the Court of Appeals demonstrating such overhearing, but the court would not take cognizance of them as they were not part of the trial record. See App. at 9a n.11.

tively." A subsequent application, affidavit and order contained similar provisions.

However, as things turned out, the Government did not install a wiretap on the telephone "bearing telephone number 274-5281," but rather tapped a telephone bearing the number 277-5421, which, as it was later learned, was a "bootleg" telephone subscribed to by a neighbor of the Brunos and extended into the basement of the Bruno home by wire from the neighbor's house, by a person or persons unknown. It was contended that the Government had no previous knowledge of the existence of this "bootleg" telephone.

Inasmuch as the identity or existence of the telephone actually tapped had not been known or disclosed to the court prior to the installation of the wiretap, the petitioners moved in the court below for suppression of the communications obtained through the tap of the "bootleg" telephone on the basis that there was no showing of probable cause as to the telephone upon which an order could properly have been predicated, that interception of the wire communications on this telephone were not authorized by the Attorney General, or any Assistant Attorney General specially designated by him, as required by 18 U.S.C. §2516, or by any judicial order, as required by 18 U.S.C. §2518, and that the periodic reports filed with respect to the interceptions authorized by the May 24 and June 17 orders were inaccurate and improper insofar as they did not properly identify the telephone line actually being monitored.

Finding that the interception of the "bootleg" telephone was unintentional and not negligent, the court denied the motion to suppress, and the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. Title III Cannot Be Used To Justify Massive Invasions of Privacy By Means Of Non-Stop Public Broadcasting Of Private Conversations.

This case presents the important question of whether Title III authorizes electronic interception of private conversations by means of a surveillance procedure which of necessity *maximizes* the attendant invasion of privacy in every single significant regard. Petitioners respectfully submit that the legitimization of the car bug in this case effectively renders this Court's "reasonableness" test in *Scott v. United States,* 436 U.S. 128 (1978), and Title III's minimization safeguards, a complete nullity, and that this Court must clarify the nature and scope of the minimization required in the case of broadcasting units (as opposed to telephone wiretaps) in order to ensure compliance with the purposes of Title III and the decisions of this Court construing it. Specifically, petitioners respectfully submit, in the alternative, that (1) the courts below adjudicated this issue in a manner in direct conflict with the letter and spirit of this Court's decision in *Scott,* and (2) in the event *Scott,* a wiretap case, is held not to reach the question presented here arising out of a radio broadcasting unit, this case presents an important question of federal law which has not been, but should be, settled by this Court.

In *Scott,* this Court approved the holding of the Court of Appeals for the District of Columbia Circuit to the effect that "[T]he decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions . . . ." 436 U.S. at 134. Declining to promulgate an "inflexible rule of law," this Court held that:

> Whether the agents have in fact conducted the [electronic surveillance] in such a manner [as to minimize reasonably] will depend on the facts and circumstances of each case. *Id.* at 139, 140.

In *Scott* itself, it was held not unreasonable for agents to have intercepted, via a wiretap, a number of telephone calls of which forty percent were "clearly" crime related and "many" of the remaining calls very short, including wrong number calls, calls to unavailable parties, and calls to a weather report recording number. The Court's conclusion in *Scott* is unexceptionable.

How "reasonable," in contrast, is the failure, for no good reason whatsoever, to obtain judicial authorization for a known massive invasion of privacy ongoing for a full month?[4] How "reasonable" is it to fail utterly to comply with clear and reasonable guidelines regarding when interception is and is not to take place? Above all, how "reasonable" is it to select, as the device for effectuating the interception, one that cannot be shut off by the responsible officers and that broadcasts, non-stop, to anyone within a half-mile range in possession of a commonly available radio unit? The answer is, it is not reasonable at all.

Unlike the agents in *Scott, supra,* who employed a *telephonic wiretap,* the agents here affixed to appellant Zalmonowski's car a device which *broadcast to the public,* regardless of speaker, circumstances or content. The possibilities of grossly embarrassing or compromising consequences of the indiscriminate public dissemination of this speech are limited but by the imagination. It is established that appellant Zalmanowski has a family, that

[4]The bug remained in the car, broadcasting to the world, during approximately six out of the fourteen weeks it was in the car. See App. at 272-6.

his wife also used the car, that the car was regularly parked at his home, that his neighbors as well as anyone else within half a mile range could overhear conversations in the car if they but had the commonly available receiver required. It is conceded that the F.B.I. agents could have planted a bug with a shut-off capacity. App. at 277. There was no explanation of why they failed to do so. There was, in short, no justification whatsoever offered or available for the agents' direct contravention of Title III's minimization requirement as formulated in the authorization orders' express limitations on interception. The broadcasting of everything occuring in the car for three and one-half month period was unreasonable in the extreme, and required suppression under *Scott.*

No new principle or theory is argued here. It was a decade ago that this Court declared, in *Katz v. United States,* 389 U.S. 347, 352 (1967) that:

> No less than an individual in a business office, in a friend's apartment, or *in a taxicab,* a person in a telephone booth . . . is surely entitled to assume that the words he utters . . will not be broadcast to the world. (Emphasis added).

Katz is dispositive of the present case. This Court should, accordingly, affirmatively reject the District Court's theory that because the speech of the car's occupants was broadcast indiscriminately *to the public,* there was no violation of Title III's minimization requirement, such requirement being addressed (the court theorized) *solely to the government agents.* Appellants submit, rather, that any failure of the wording of the minimization requirement expressly to address the need for minimization vis-a-vis the public reflects, not Congress' indif-

ference to that issue but Congress' taking this matter for granted. The briefest perusal of Title III reveals in unmistakable terms Congress' insistence on safeguarding the privacy of non-criminal (indeed, of criminal) speech. Title III is unique in federal criminal law for the fullness and specificity with which it designates what must be done, when, how, and by whom, before, during the course of, and following the investigative procedures it authorizes. The law breathes concern for the "privacy of individual thought and expression." *United States v. United States Distric Court,* 407 U.S. 297, 302 (1972). One of its two express purposes is "protecting the privacy of wire and oral communications." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968), in 2 U.S. Code Cong. and Adm. News (1968) at 2153.

It is manifestly untenable to argue that notwithstanding all the obstacles Title III puts in the way of law enforcement officers seeking to intercept speech for the public good, notwithstanding its requirement that the fruit thereof be sealed under court order, and notwithstanding its palpable concern to preserve the privacy of speech—that nevertheless Title III raises no bar to the indiscriminate public broadcasting of private conversations, criminal or innocent, by means of a government planted bug. Such reasoning is an affront to logic and law, and must be summarily rejected by this Court.

On appeal, the majority, observing that one seeking suppression of evidence must display a violation of some constitutional or statutory right justifying suppression, specified that

> Appellants did not present any evidence to the District Court that any member of the public actually overheard any conversations taking place in the automobile. Slip opinion at 9 n.11, infra at 9a.[5]

[5]The failure to present such evidence was largely the result of government resistance to defendant counsel's attempts to obtain

[footnote continued]

Yet, if—something that is not clear—the majority deemed petitioners' failure to present any such evidence to preclude their bearing the requisite burden of proof, the majority erred. For affirmative proof of overhearing is manifestly unnecessary where publicly retrievable broadcasting is conceded to have been occurring in a populous area[6] for three and one-half months. As Judge Lively cogently observed in dissent, *infra* at 16a:

> [I[t is hard to conceive of a more flagrant breach of the right of privacy than to have one's conversations

information about the bug. It having been established that radio receivers capable of picking up the car bug transmissions were readily available to the public in over-the-counter sales, the government objected to all efforts to establish the actual extent of the instrusion. Over defense counsel's protestation that the defendants had a right to know "to what degree did this [FBI] agent open up Mr. Zalmanowski's car to the world," the court, on the government's objection, prevented the presentation of evidence regarding the radio frequency employed by the bug. The following colloquy took place with regard to this matter:

> *The Court:* If they did know the frequency, is it a frequency that would be available to a wide group of people?
>
> *Witness* [FBI Agent]: If you had a certain type of receiver, that was, you know, tuned to that frequency, I just don't know how many people that could listen. They would have to know that frequency.
>
> *Mr. LaRene:* Judge, if I know the frequency, I can find out because I can do an investigation and I think that it unfairly restricts the scope of my examination and my ability to defend in this case to exclude that information from me. The government's secrecy can only carry so far.
>
> *The Court:* I will sustain the objection at this time.

The Court then indicated that it would let the government make a showing in camera regarding why it was necessary to conceal the frequency. No such showing was ever made, but the objection was never overruled. App. at 252.

[6]Dearborn and Detroit, Michigan.

broadcast at large without his knowledge or consent.[7]

The Court of Appeals majority's insistance on express proof of overhearing is particularly troublesome in its startling and unseemly contrast with the majority's readiness to engage in sheer speculation, on the basis of no evidence whatsoever, regarding the functioning of electronic implements—where the result of that speculation was adverse to petitioners. Petitioners respectfully submit that a court which refuses to consider affidavits documenting the overhearing on the ground that this evidence should have been presented below, cannot properly engage in sheer speculation about electronics concerning which there was no evidence.[8] Yet precisely this was done here, leading to an unevenhandedness of treatment that might well concern this Court in the exercise of its supervisory powers.

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[7] Cf. *Jacobson v. Rose*, 592 F.2d 515, 522 (9th Cir. 1979):

> Nevada Bell contends that because none of its employees actually listened to tapped conversations, it has not violated the statute.
>
> We disagree. In enacting Title III Congress intended to establish sanctions that would deter illegal invasions of privacy through wiretapping. When many individuals together take the steps necessary for the recording of telephone conversations, the victim's privacy is violated, regardless of which particular individuals actually listen to the tapes.

[8] Petitioners utterly rejected the trial court's and the majority's speculation that bugs with shut-off capacity are more likely to break down than nonstop bugs. It is a commonplace of electronics that more complicated devices are often more problem-free than less advanced ones. Compare, for example, solid-state appliances with their predecessors. The question requires, at a minimum, at least as much evidentiary probing as the question of overhearing here at issue.

Exhaustive research into minimization case law reveals *not a single decision* legitimizing interception anywhere near as overbroad, or anywhere near as palpably in derogation of the applicable authorization orders, as the three and one-half month continuous broadcast to the world of the conversations or solo musings of every individual who had the misfortune to set foot into petitioner Zalmanowski's car during the period that it was bugged. Indeed, each of the very cases referred to by the Court of Appeals majority as authority on "reasonableness" militates in no uncertain terms for the suppression of the evidence here at issue. In *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973), for example:

> The detectives who conducted the . . . surveillance established and observed reasonable guidelines in limiting their intrusion. By considering the nature of the persons conversing and the subject of the conversations, they reasonably limited interception to communications which were likely to be relevant. They also halted all interception as soon as the conversation appeared to be nonpertinent even if it meant not hearing simultaneously a pertinent conversation.

In *United States v. Hyde*, 574 F.2d 856, 869 (5th Cir. 1978),

> Every call was tapped until it became clear that it did not concern criminal activities: the tape was then shut off. No purely personal calls, as between Mrs. Hyde and her mother, were listened to.

In *United States v. James*, 494 F.2d 1007, 1018 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1974), the Court of Appeals for the District of Columbia Circuit cogently observed that

> What is 'reasonable,' 'practicable,' of 'feasible' depends upon the facts and circumstances in each case . . . . It is certainly unreasonable and goes beyond the limits of practicability or feasibility in every case to give a seizing officer what the [Supreme Court in *Berger v. New York,* 388 U.S. 41, 59 (1967)] characterized as a 'roving commission to "seize" any and all conversations..

There were no extenuating circumstances which might suggest the permissibility of the instrusive method employed by the government in this case. There was no evidence presented, nor could there have been, that petitioner Zalmanowski's family car, garaged at his home, was used only, or even principally, for conducting criminal activities.[9]

> When the probability is high that persons not under investigation will be using the tapped telephone or that the content of the calls will not pertain to the subject matter of the investigation, the government must adopt procedures to limit the interception of those kinds of calls. Thus, it is not surprising that statutory or constitutional violations are most often found when home or legitimate business telephones are tapped, for the citizen's expectation of privacy in such surroundings in high. *James, supra,* at 1020.

Again, the intercepted conversations did not take place in coded or guarded language, such as has in different contexts justified less rigorous minimization standards. Indeed, much the contrary is the case, as the transcriptions of the intercepted discussions make clear.

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[9]The affidavit in support of the initial order authorizing the bug merely recites that probable cause exists to believe that petitioner Zalmanowski's car is being used "in connection with" certain gambling offenses. App. at 15-16.

As Judge Lively observed in dissent, infra at 19a, none of the cases cited in the majority opinion—and, it may be added, no other reported case where suppression was denied—

> involved the use of a device without cut off capability which indiscriminately broadcast all conversations which took place in private property.

Petioners respectfully submit that this Court must declare constitutionally and statutorily impermissible the gross and unnecessary invasion of privacy resulting from the planting of this non-stop broadcasting unit, if the Fourth Amendment and the minimization requirement are to have any meaning with regard to interception by radio units.

2. The Decision Of The Court Of Appeals Upholding The Admission Of Wire Communications Intercepted On A Telephone Not Authorized To Be Intercepted Improperly Dilutes The Particularity And Description Requirements Of Title III.

In support of its refusal to suppress the fruit of the undescribed "bootleg" telephone, the Court of Appeals wrote:

> The major flaw in the appellants' position is the contention that the Government lacked authority to tap the "bootleg" telephone. Initially it is important to note that the District Court found the wiretap applications contained sufficient information to establish probable cause to wiretap any telephone located in the Bruno resident. Moreover, nothing in the language of Title III requires the Government in its application or the District Court in its order to include the number of the telephone line that is to be tapped.
>
> * * *

> We conclude, as did the District Court, that the wiretap authorization had as "its clear purpose" the authorization to tap "all telephones in the Bruno home," and that the addition or deletion of telephone numbers in the wiretap order had no constitutional or statutory significance. Infra at 11a.

Both the District Court and the Court of Appeals totally disregarded the fact that the only showings in accordance with any of the requirements of 18 U.S.C. §2518, were set up in the Government's applications in terms of particular telephone numbers. This method of description was selected not by petitioners but by the Government.

Thus the May 24 affidavit premised its probable cause showing upon informant information that Mrs. Bruno had used telephones bearing the numbers 274-5281 and 565-8469 to transmit wagering information. It is noteworthy that when, in August, application was made again for authorization to intercept Mrs. Bruno's telephones, even after the existence of the bootleg telephone was known, it was again only these two telephones which were intercepted. Had the Government wished or intended to intercept all of the telephones in Mrs. Bruno's house, it could have easily asked in August for authority to intercept all three telephones.

The essence of the holdings below was that what was involved was a failure to describe a telephone (the bootleg phone) which it was the Government's purpose to tap, and that since (1) neither logic nor Title III require an intercepted telephone to be described by number, (2) the intention of the Government was to secure authorization to intercept all the telephones in the Bruno home of which it had knowledge, and (3) the judicial authorization given was for all such telephones, the failure to describe one of three phones was not fatal. This reasoning runs afoul, however, of the requirement of the Fourth Amendment that search warrants "particularly" describe the places to be seized.

It may very well be that the Government would have endeavored to secure judicial authorization to tap the bootleg telephone, had it known of its existence. However, by the Government's own theory, it did not know of the existence of the bootleg phone prior to June 21, 1977. It was the Government which chose to describe the phones which it wanted to tap by way of telephone numbers, and attempted to justify its request to tap phones in Louise Bruno's house by referring, in its application and affidavit in support of that application, to informant information it supposedly had which identified particular phone numbers as being used in Louise Bruno's numbers operation. If the Government had wished to secure permission to tap all of the telephones in Louise Bruno's home, all it would have had to do was ask for that permission. Apparently the Government only felt that it had probable cause to tap the telephones which were identified as being the telephones that it wished to tap. The "bootleg" telephone was not so identified, the Government did not wish to tap it, and the District Court did not wish to and did not authorize its interception. This Court can hardly brush away these indisputable facts by saying that the tap of such a telephone would have been authorized had the Government requested it, since to do so is to justify a search by its results. This is the functional equivalent of justifying a search which discloses contraband solely by the fact that the contraband was indeed found, thus saying, in effect, that probable cause would have existed in fact if the true facts had been

known, since obviously the subject of the search possessed the contraband. This is not only a logical failing, but a patent denigration of important Fourth Amendment rights.

The trial court noted (and the Sixth Circuit agreed) that had the telephone numbers of the telephones to be tapped been "accidently misdescribed in the Order", it would not be a basis for suppressing the electronic surveillance. However, what is involved in the case at bar is not an accidental clerical error, but a situation in which the Government simply had no information (by its own theory) to justify a search which was in fact performed and no judicial authority for performing that search. The courts below clearly erred when they held otherwise.

In *United States v. United States District Court,* 407 U.S. 297, 301-302 (1972) this Court characterized Title III as follows:

> Title III of the Omnimub Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. §2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression.

It described the requirement of §2518 as "delineating permissible interceptions of particular criminal activity upon carefully specified conditions" 407 U.S. *supra* at 306. The approach of the courts below, which cavalierly sweeps aside the essence of the requirement of prior authorization, on the ground, essentially, that the Government would have described the bootleg telephone had

it known about it, is as "incongrous" in the context of the carefully drawn statutory scheme, and as inconsistent with its requirements of particularity and description, as was the Government's assertion of the right to conduct warrantless "national security" wiretaps in that case.

In *United States v. United States District Court, supra,* this Court rejected the attempt to do away with the requirement of prior authorization. The decisions below strike even more clearly at the heart of that requirement permitting completely warrantless interceptions, not on the grounds of "national security," but simply on the basis of inadvertance. The effect of these decisions is seriously to denigrate the particularlity and description requirements of 18 U.S.C. §2518(4). Contrary to the conclusion of the Court of Appeals that "the wiretap orders in the instant case fully complied" with §2518(4)'s particularization requirements, *infra* at 23a, the indisputable fact is that, as applied to the bootleg telephone, they did not. They simply failed to describe so much as the "communications facilities" which were in fact intercepted, as required by §2518(4) (b).

However, the core of the error in the decisions below is not merely the failure to identify a technical noncompliance with the requirements of Title III, but the adoption of a broad-brush approach which sweeps away the carefully drawn protections of the statute. Whatever the technical basis of noncompliance, the central issue posed by this aspect of the case is that through inadvertance, neglect or a bizarre twist of fate, the Government intercepted a telephone whose interception was not authorized. To reduce this departure from the statute's requirement of particular description and prior authorization to a question of quasi-clerical error represents the kind of misapprehension of both the sense of the situation and

the statutory scheme that bespeaks a pressing need for guidance from this Court.

CONCLUSION

If left standing, the decision below effectively nullifies, with regard to electronic interception by radio bug, the safeguards and guarantees of the Fourth Amendment, Title III, and this Court's "reasonableness" requirement in *Scott*. The Court should ensure that the same standards applied in the case of wiretaps apply, with equal force, to egregious invasions of privacy resulting from interception by a broadcasting unit. The Court should also reaffirm the requirement that prior authorization be obtained for telephone wiretaps. For these reasons, the Court should issue a Writ of Certiorari to review the decision below.

Respectfully submitted,

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Dated: January 5, 1979

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APPENDIX

APPENDIX A

Nos. 78-5312
78-5313
78-5314

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVE FELDMAN, RICHARD ZALMANOWSKI, and KENNETH BAKER,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 26, 1979.

Before: CELEBREZZE and LIVELY, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which PHILLIPS, Senior Circuit Judge, joined. LIVELY, Circuit Judge, (pp. 16-19) filed a separate opinion concurring in part, dissenting in part.

CELEBREZZE, Circuit Judge.

These cases are before the court on direct appeal from judgments of conviction entered upon jury verdicts against appellants Dave Feldman, Richard Zalmanowski, and Kenneth Baker for conducting an illegal gambling business and con-

spiracy to commit that offense, in violation of 18 U.S.C. §§ 1955, 371, and 2.[1] These consolidated appeals raise a number of issues relating to the validity and effect of three court orders issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968[2] authorizing wiretaps of several telephones and the surreptitious entry into appellant Zalmanowski's automobile for the purpose of installing, servicing, and removing an electronic listening device. The Government's proof against appellants was largely derived from the electronic surveillance. Each appellant filed appropriate pretrial motions to suppress the evidence gathered by the electronic surveillance. The district court denied appellants' motions. 455 F. Supp. 26 (E.D. Mich. 1977).[3]

Appellants raise the following allegations concerning the validity of the interceptions:

1. The evidence derived from the electronic surveillance equipment installed in Zalamanowski's automobile was improperly admitted into evidence in view of the district court's inability, consistent with the fourth amendment and Title III, to authorize a surreptitious entry for the purpose of installing an electronic listening device. Furthermore, the failure on the part of monitoring agents to comply with the minimization requirements of Title III with respect to the Zalmanowski bug also requires suppression.

[1] Vito Giacalone and Elias Koury were also indicted on both counts of the indictment. The district court impaneled two separate juries, one to try Giacalone and the other to try the three appellants and defendant Koury. Giacalone was found not guilty on December 16, 1977. Koury was convicted on both counts with appellants on December 20, 1977. Koury is not involved in this appeal.

[2] 18 U.S.C. §§ 2510 *et seq.*

[3] On August 19, 1977, the district court issued two opinions and orders denying various motions to suppress evidence. One of these opinions is reported at 455 F.Supp. 26 (E.D. Mich. 1977). The other opinion was not reported. *See* App. 170.

2. The district court erred in refusing to suppress evidence obtained from a wiretap of a telephone line not authorized to be intercepted.

3. The second two surveillance orders were improperly issued extensions of the first surveillance order and therefore the evidence derived from the second two orders must be suppressed.

For the reasons stated below we reject each of the above contentions and affirm the convictions.

I.

On May 24, 1976, the district court issued an order pursuant to Title III authorizing the interception of wire communications on six telephone lines[4] and the interception of oral communications taking place in a 1976 Lincoln Continental leased and operated by Zalmanowski. This order specifically authorized FBI agents to "surreptitiously enter the foregoing vehicle [the 1976 Lincoln Continental] for the purpose of installing, maintaining, and removing any such oral interception devices utilized pursuant to the authority granted." This order required termination of interception within twenty days or upon attainment of the authorized objective, minimization of interceptions, and five, ten and fifteen day progress reports.

On June 17, 1976, the district court granted the Government's request for permission to intercept telephone conversations on five telephone lines, two of which were included in

[4] Two of the telephone lines were listed to Kenneth and Dennis Bruno and were located at 17404 O'Conner, Allen Park, Michigan. Two of the telephone lines were listed to Charles Cotton and Lela Jackson and were located at 20486 Steel, Detroit, Michigan. The remaining two telephone lines were listed to Moon Shell Service Station located at 13824 Livernois, Detroit, Michigan. The Government had probable cause to believe Louise Bruno, an unindicted co-conspirator was using the Bruno phones for gambling transactions. Charles Cotton, also an unindicted co-conspirator, was believed to be using his telephones and the service station telephones for gambling purposes.

the May 24 order,[5] and oral communications taking place in the 1976 Lincoln Continental. This order contained the same termination, minimization, and progress report requirements as the May 24 order. On June 25, 1976, the Government voluntarily terminated interception pursuant to the June 17 order when it discovered that FBI agents were intercepting conversations taking place on a "bootleg telephone"[6] instead of conversations taking place on the telephone line they had intended to tap.

On August 5, 1976, the district court issued a third interception order authorizing the interception of oral communications taking place in the Lincoln Continental, the wiretap of two telephone lines in Zalmanowski's residence, and two telephones in the Bruno residence. This third order also required similar termination, minimization, and progress reports.

II.

One of appellants' primary contentions on appeal relates to the evidence derived from the electronic listening device (bug) installed in Zalmanowski's automobile. Appellants assert that the district court lacked authority under Title III and the fourth amendment to authorize FBI agents to surreptitiously enter Zalmanowski's automobile in order to install and remove the bug. Appellants argue that since installation of the bug in Zalmanowski's automobile was in violation of Title III and the fourth amendment the district court erred in

[5] Pursuant to the June order wire interception was initiated on three telephones used by Zalmanowski. The June order also included authorization to tap the two Bruno telephones included in the May 24 order. The Bruno telephones are the telephones involved in the "bootleg phone" issue. *See* notes 13-17 *infra*, and accompanying text.

[6] A "bootleg" telephone is an illegally installed extension connected to a telephone line not listed to the owner of the illegal extension. Its purpose is to avoid electronic surveillance by using a telephone line which authorities would not suspect is being used for criminal activity.

failing to suppress the evidence derived from the bug. We disagree.[7]

Appellants reply on this court's original decision in *United States* v. *Finazzo*, 583 F.2d 837 (6th Cir. 1978), *vacated and remanded*, — U.S. —, 47 U.S.L.W. 3714 (1979), as direct support for their position. In our decision in *Finazzo* a majority of the court held that no authority exists in Title III permitting a surreptitious entry by officials in order to install an electronic listening device. The court further held that no constitutional authority exists to authorize surreptitious entries in absence of statutory authority. *Id.* at 850. Our position in *Finazzo*, however, was specifically rejected by the Supreme Court in *Dalia* v. *United States*, — U.S. —, 99 S. Ct. 1682 (1979).

The Supreme Court in resolving a conflict among the circuits[8] held in *Dalia* that "the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment." *Id.* at —, 99 S. Ct. at 1689. The Court further held that Title III authorizes the use of a surreptitious entry in order to install a bug and that Congress clearly understood it was conferring

[7] The Government argues that only appellant Zalmanowski has standing to raise this contention. In light of our disposition of the issues involved and the Government's concession of Zalmanowski's standing, we need not decide the issue of standing with respect to the other appellants. Irrespective of the other appellants' standing, we would be required to decide this issue on the merits. *See Scott* v. *United States*, 436 U.S. 128, 135-36 n. 10 (1978); *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 44-45 (1974); *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973). *See also Rakas* v. *Illinois*, — U.S. —, 99 S. Ct. 421 (1978).

While Zalmanowski only leased the 1976 Lincoln Continental, we see no distinction of a constitutional dimension between owning and leasing an automobile for purposes of standing upon the facts of this case.

[8] *See United States* v. *Finazzo*, 583 F.2d 837 (6th Cir. 1978), *vacated and remanded*, — U.S. —, 47 U.S.L.W. 3714 (1979); *United States* v. *Santora*, 583 F.2d 453 (9th Cir. 1978), vacated and remanded, — U.S. —, 47 U.S.L.W. 3747 (1979); *United States* v. *Scafidi*, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); *United States* v. *Ford*, 180 U.S. App. D.C. 1, 553, F.2d 146 (D.C. Cir. 1977); *United States* v. *Agrusa*, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

power upon the courts to authorize surreptitious entries when it enacted Title III. *Id.* at —, 99 S. Ct. at 1689-92. In view of the Supreme Court's express holdings in *Dalia* and its subsequent vacation of our opinion in *Finazzo*, no constitutional or statutory rights maintained by the appellants were violated by the surreptitious entry into the 1976 Lincoln Continental.

The appellants further assert with respect to the evidence derived from the bug placed in Zalmanowski's automobile that it should be suppressed for the reason that FBI monitoring agents failed to comply with the minimization requirements of the district court order and of Title III.[9] Specifically, appellants argue that the monitoring agents violated the district court order by installing a bugging device which could not be deactivated by remote control when conversations not otherwise subject to seizure took place in the automobile. Appellants further submit that the bugging device broadcast on a frequency which was accessible to public reception and therefore the bug "broadcast to the world" the conversations taking place in the automobile. It is the nature of the electronic listening device selected for use in the vehicle, not the failure on the part of monitoring agents to cease monitoring conversations not otherwise subject to interception, which is the primary basis of appellants' allegations.

In *Scott* v. *United States*, 436 U.S. 128 (1978), the Supreme Court articulated the appropriate standard to be applied in determining whether monitoring agents have complied with the minimization requirements of Title III. The Court held that the proper approach for evaluating compliance with the minimization requirement is to objectively assess the reason-

[9] U.S.C. § 2518(5) provides in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

ableness of the monitoring agents' actions in light of the facts and circumstances confronting them at the time. The focus of the inquiry is to be upon the agents' actions, not their motives or intent, in conducing the surveillance.[10] *Id.* at 135-38.

Many courts in applying the reasonableness test adopted by the Supreme Court in Scott have considered three factors in reviewing the Government's attempts to minimize electronic surveillance; the nature and scope of the criminal investigation; the Government's reasonable expectations of the character of conversations; and, the extent of judicial supervision over the surveillance. *See United States* v. *Hyde*, 574 F.2d 856 (5th Cir. 1978); *United States* v. *Clerkley*, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978); *United States* v. *Abascal*, 564 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States* v. *James*, 494 F.2d 1007 (D. C. Cir.), *cert. denied*, 419 U.S. 1020 (1974). The fourth and second circuits have phrased the inquiry in the following way: "[t]he [minimization] statute is deemed to be satisfied if 'on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion.'" *United States* v. *Clerkley*, 556 F.2d 709, 716 (4th Cir. 1977), *quoting United States* v. *Tortorello*, 480 F.2d 764, 784 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

When confronted with appellants' arguments on this issue the district court made the following findings:

> Any argument made to the effect that the means employed in this case were unreasonable would be frivolous. First, any additional intrusion caused by the fact that the transmitter could not be switched off, and none were

[10] "This is not to say, of course, that the question of motive plays absolutely no part in the suppression inquiry. On occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *United States* v. *Scott*, 436 U.S. 128, 139 n. 13 (1978). But the assessment and use of motive is irrelevant to our analysis of whether monitoring agents violated minimization requirements. *Id.*

brought to the attention of this Court, would be *de minimis*. The monitoring of any transmitted conversation by anyone other than an agent would require the occurrence of a number of coincidences. The person would have to be in the vicinity of the transmitter, have the equipment necessary to receive the broadcast and be tuned to the frequency upon which it broadcasts (one of thousands). The possibility that these three events would occur simultaneously is slight, and, even if it were to occur, unless either both the person and the transmitter were both travelling in the same direction or both were not moving at all, the amount of any conversation intercepted would be slight due to the fact that the limited range of the transmitter would place it too far from the interceptor to be received in a very short time.

Second, the severity of the intrusion would be slight for the simple reason that any person who intercepted a communication would in all likelihood have no idea who it was who was being intercepted. This in addition to the fact that the period of the interception would be likely to be brief would cause the severity of any intrusion to be slight, indeed.

Finally, the use of a transmitter that could be shut off when not in use would have the potential to cause more serious intrusions that it would be likely to prevent. An important limitation on the effectiveness of an electronic surveillance device is that "[m]ore often than not, the device, for one reason or another, sometimes technical and sometimes human, will not work." American Bar Association, Standards Relating to Electronic Surveillance 45 (Approved Draft, 1971) (citation omitted). It follows that the more complex the device employed, the more likely it is that a malfunction will occur, and the occurrence of a malfunction would have required an additional surreptitious entry of the vehicle — an intrusion far more severe than a transmitter that could not be turned off could generate and one more likely to occur if the more complex device had been employed.

455 F. Supp. at 37-38. The district court applied the correct legal standard and we cannot conclude that its findings are clearly erroneous.[11] Appellants have failed to display that the monitoring agents exhibited a high disregard for appellants' privacy rights or that they did not do all they reasonably could to avoid unnecessary intrusions.[12]

III.

Appellants further contend that the trial court erred when it refused to suppress evidence derived from a wiretap of a "bootleg telephone"[13] located in the Bruno residence. The line to which the "bootleg" phone was connected was installed by the telephone company at a home directly behind the Bruno residence. Without the knowledge of the telephone company this neighboring line was brought into the Bruno residence by an ordinary wire attached to the neighboring line which ran between the backyards.[14] Pursuant to proper procedure and based upon appropriate affidavits, the Govern-

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[11] It is well settled that in seeking suppression of evidence the burden of proof is upon the defendant to display a violation of some constitutional or statutory right justifying suppression. In the instant case appellants contend that the device used in Zalamowski's automobile was such as to allow the "whole world" to overhear the conversation. Appellants did not present any evidence to the district court that any member of the public actually overheard any conversations taking place in the automobile. Appellants have attempted to submit such proof to this court through affidavits executed on February 8, 1979 and attached to their reply brief. The proper practice would have been to introduce or proffer such evidence to the district court so that it would have been properly included in the record on appeal. In light of appellants' failure to include those affidavits in the record, we may not consider them here.

[12] Though the record is not extensive on this point, considering the fact that this case resulted from a criminal investigation of significant dimensions and the fact that the district court closely scrutinized the surveillance through the use of five, ten, and fifteen day progress reports, we cannot conclude that the district court inappropriately determined that the utilization of a device which could not be deactivated was reasonable upon the facts of this case.

[13] *See* note 6, *supra*.

[14] The record is silent on the knowledge of the neighbor concerning the existence of the "bootleg" telephone.

ment secured authorization to wiretap the two telephone lines properly listed to the Brunos. The wiretap orders specifically listed the telephone numbers of the lines to be tapped. According to all available telephone company records, the Brunos had only two telephones in their residence.

Upon the installation of the wiretap the Government tapped one of the lines specifically listed in the order, and by mistake and mere coincidence tapped the line to which the "bootleg" phone was connected.[15] Appellants submit that since the "bootleg" telephone number was not specifically listed in the wiretap order the Government lacked authority to tap that line; therefore, the argument continues, all evidence derived from the wiretap of the "bootleg" phone must be suppressed.

The district court refused suppression on the basis that probable cause did exist to wiretap each telephone located in the Bruno residence, including the "bootleg" phone, and that nothing in the language of Title III requires the Government to specify the telephone numbers of the telephone lines it seeks to tap. The district court further held that even if Title III so required the particularization of telephone numbers in the wiretap order suppression was not required in view of the fact that "'[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications "unlawful."'" *United States* v. *Donovan*, 429 U.S. 413, 433 (1977), *quoting United States* v. *Chevez*, 416 U.S. 562, 574-75 (1974). Relying on *Donovan* the district court found that since the Government did not fail "'to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situ-

[15] When the FBI agent installed the wiretap he initiated a series of tests designed to insure that he was indeed tapping the correct telephone line. These tests led the agent to reasonably believe he was on the correct telephone line. For example, he actually heard a woman discussing what appeared to be gambling business. The FBI agent, anxious to complete the tap for security purposes, assumed he had the correct line. *See* Tr. of Motion to Supress, Vol. I, 38-40.

ations clearly calling for the employment of this extraordinary investigative device,'" 429 U.S. at 433-34 *quoting United States* v. *Giordano*, 416 U.S. 505, 527 (1974), suppression was not required. We agree.

The major flaw in the appellants' position is the contention that the Government lacked authority to tap the "bootleg" telephone. Initially it is important to note that the district court found the wiretap applications contained sufficient information to establish probable cause to wiretap any telephone located in the Bruno residence. Moreover, nothing in the language of Title III requires the Government in its application or the district court in its order to include the number of the telephone line that is to be tapped.

Section 2518(4) of Title 18 specifies what must be included in a wiretap order:

> Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (a) the identity of the person, if known, whose communications are to be intercepted;
>
> (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
>
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

The wiretap orders in the instant case fully complied with the above particularization requirements. We can find no authority to support appellants' position that the inclusion of telephone numbers to identify telephone lines to be tapped is required by the particularization requirements of either the fourth amendment or Title III.[16] We conclude, as did the district court, that the wiretap authorization had as "its clear purpose" the authorization to tap "all telephones in the Bruno home," and that the addition or deletion of telephone numbers in the wiretap order had no constitutional or statutory significance.

Assuming, *arguendo,* that the procedures of Title III required the articulation of the telephone number of the "bootleg" telephone in the authorization order, the failure to include that number in the authorization order does not render the interception unlawful. In *United States* v. *Donovan,* 429 U.S. 413, 433-34 (1977), the Supreme Court stated that suppression is required only for a failure to satisfy those Title III requirements that "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *Accord United States* v. *Giordano,* 416 U.S. 506, 527 (1974). We do not feel the failure to list the *unknown*[17] "bootleg" telephone number in the authorization order resulted in a failure to satisfy a statutory requirement which Congress implemented in order to insure electronic surveillance would only be used in situations "clearly calling" for its use. Assuming, as we do here, that Title III requires the particularization of telephone numbers in the

[16] *Cf. United States* v. *Sklaroff,* 506 F.2d 837 (5th Cir.), *cert. denied,* 423 U.S. 874 (1975).

[17] The district court found that the existence of the "bootleg" telephone was not known by the Government agent at the time the wiretaps were installed. App. 173. We render no opinion as to whether knowledge of the existence of the "bootleg" phone would have affected the instant suppression inquiry. *See also United States* v. *Donovan,* 429 U.S. 413 (1977).

authorization order, nothing in the language or history of Title III suggests that Congress intended this particularization to "play a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States* v. *Chevez,* 416 U.S. 562, 578 (1974). Therefore, we conclude that the failure to list the "bootleg" telephone number in the authorization order did not deprive the Government of authority to tap that telephone line and, even if Title III mandates such particularization, the failure to so include the telephone number is not the sort of Title III violation which requires suppression.

IV.

The appellants further contend that the second two wiretap orders were improperly issued extensions of the first wiretap order and therefore all evidence seized through the authorization granted in those orders should have been suppressed.[18] Appellants assert that the Government failed to comply with 18 U.S.C. §§ 2518(1)(f) and (5) which set out additional prerequisites necessary for securing an extension order. We disagree.[19]

In an application for an extension order § 2518(1)(f) requires the Government to include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."[20]

[18] The problems relating to standing are identical to those discussed above. *See* note 7, *supra.*

[19] 18 U.S.C. §§ 2518(1)(f) and (5) set out additional prerequisites for wiretap orders only where the application is for an extension of a previous order. The Government strenuously argues that the June and August orders were not extensions since they involved additions of new suspects and several new telephones. There is support for the Government's position. *See United States* v. *Wac,* 498 F.2d 1227, 1231 (6th Cir. 1974). We choose, however, not to decide this issue on that basis.

[20] 18 U.S.C. § 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made

As the Supreme Court stated in *United States* v. *Giordano*, 416 U.S. at 532,

> an extension order could validly be granted *only* upon an application complying with subsection (1) of § 2518. Subsection (1)(e) requires that the fact of prior applications and orders be revealed, and (1)(f) directs that the application set out either the results obtained under the prior order or an explanation for the absence of such results. Plainly the function of § 2518(1)(f) is to permit the court realistically to appraise the probability that relevant conversations will be overheard in the future. If during the initial period, no communications of the kind that had been anticipated had been overheard, the Act requires an adequate explanation for the failure before the necessary findings can be made as a predicate to an extension order.

Upon a review of the applications submitted by the Government for the June and August wiretap orders not only was the district court appraised of the existence of prior wiretap orders, but it was also provided with excerpts of prior intercepted conversations. We conclude, therefore, that the requirements of § 2518(1)(f) were fulfilled and that the district court was in possession of sufficient information to "permit the court realistically to appraise the probability that relevant conversations [would] be overheard in the future." *Id.*

V.

For the foregoing reasons we conclude that the district court appropriately denied all motions to suppress. The appellants

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in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

have raised other issues on this appeal. We have considered each one and find them to be without merit.

Accordingly, the judgments of conviction are affirmed.

LIVELY, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority on all issues except failure to observe the minimization requirements of the surveillance orders. The device which was installed in the Lincoln Continental was not a wiretap, but was a radio transmitter. With a wiretap the conversations are overheard only by authorized persons who are directly connected to the tapped line. The device used to eavesdrop on conversations in the Zalmanowski car had a range of approximately one-half mile and could have been picked up by anyone within that distance whose receiver was on the same frequency.

Each of the two orders authorizing the interception of communications in Zalmanowski's automobile provided:

> that this authorization to intercept wire and oral communications . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code . . .
>
> PROVIDING FURTHER, that the oral devices . . . shall be activated only when [the suspects] are determined by physical surveillance or voice identification to be present inside this vehicle with any of these [suspects]. Once the oral devices are activated and conversations are intercepted, the interception shall continue only so long as [the suspects] are participants in those conversations.

These provisions were included in the orders in compliance with 18 U.S.C. § 2518(5) (1976), which requires minimization in general terms.

In spite of these minimization requirements, the device which was installed in the Zalmanowski car had no shutoff capability. The bug was always "on" and every conversation was broadcast in full. The agents conducting the surveillance did not activate the device only when suspects were determined to be inside the automobile. Though the agents may have discontinued listening when it was not determined that the suspects were participants in intercepted conversations, they had no means of terminating the broadcasts and preventing interception of irrelevant conversations by others.

The constitutionally mandated requirements for electronic surveillance were adopted and elaborated by Congress in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See *Senate Report* No. 90-1097, Committee on Judiciary (April 29, 1968), reprinted in 1968 *U.S. Code Cong. & Adm. News* 2112, 2153 (citing *Berger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *United States*, 389 U.S. 347 (1967)).

Minimization of the scope of an electronic intrusion is a critical aspect of the statutory scheme and of constiutional compliance. The purpose of the minimization requirement is to avoid intrusions into private communications not reasonably related to the criminal investigation. Without limits, a warrant for a "search and seizure" of private communications becomes a "general search" equivalent to the "general warrants" which prompted the careful drafting of the Fourth Amendment and partly motivated the Declaration of Independence. *Berger*, 388 U.S. at 58.

The means of conducting the interceptions of conversations in the Zalmanowski car did not comply with the plain and literal requirements of the court order. No search is reasonable within the meaning of the Fourth Amendment if it is conducted in a way which violates the terms of the court order required to authorize it. The authority to conduct electronic surveillance accrues solely from the authorizing order of a judicial officer. This is an important feature of both the constitutional law of electronic searches and of the statutory scheme.

As the court stated in *United States* v. *James*, 494 F.2d 1007, 1021 (D.C. Cir.), *cert. denied*, 419 U.S. 1030 (1974), "The most striking feature of Title III is its reliance upon a judicial officer to supervise wiretap operations." And the statute specifically provides that a ground for suppression of

evidence obtained by electronic surveillance is that "the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(iii); see also *United States* v. *Donovan*, 429 U.S. 413, 432-34 (1977). Moreover, the clear import of *Berger, supra*, is that such surveillance inherently is too broadly intrusive and thus is an unreasonable search under the Fourth Amendment without careful limitations prescribed by a judge.

It is true that the appellants produced no proof that conversations in the car were overheard by anyone other than monitoring agents. Nevertheless, it is hard to conceive of a more flagrant breach of the right of privacy than to have one's conversations broadcast at large without his knowledge or consent. I find no basis in the record for the district court's speculation that a more serious intrusion would have occurred if the agents had complied with the minimization requirements and installed a "bug" which could have been deactivated when conversations unrelated to the investigation were taking place.

The government's argument that the detection and transmission of conversations was not an "interception" within the meaning of 18 U.S.C. § 2510(4) is not persuasive. The statute defines an interception as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* In *United States* v. *Turk*, 526 F.2d 654, *cert. denied*, 429 U.S. 823 (1976), the Fifth Circuit rejected an interpretation of "interception" which would require both acquisition of the contents of the communication by the device and actual contemporaneous hearing of the communication by the person conducting the monitoring. Rather, an intercept occurs when the device detects the communication and its contents are then transmitted, heard, or preserved by recordation for later listening. 526 F.2d at 658 and nn. 2-4.

In my view none of the circuit court cases cited in the majority opinion covers the issue in the present case. None

involved the use of a device without cutoff capability which indiscriminately broadcast all conversations which took place in private property. Though the majority opinion correctly states the holding of *Scott* v. *United States*, 436 U.S. 128 (1978), I do not believe that *Scott* supports the result which the majority reaches. A crucial requirement here was that the agents use a device which could be deactivated when irrelevant, personal conversations were detected. This was clearly required by the court orders. The result of their failure to follow the order was a serious, unauthorized intrusion.

I would reverse the district court's denial of the motion to suppress evidence obtained from "bugging" the Zalmanowski automobile.

APPENDIX B

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 78-5312
78-5313
78-5314

United States of America,
Plaintiff-Appellee,

v.

Dave Feldman, Richard Zalmanowsky,
and Kenneth Baker,
Defendant-Appellants.

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ordered that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman, Clerk

[Filed December 6, 1979]

APPENDIX C

28 U.S.C. §2518

Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonable appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commision of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify –

(a) the identity of the period, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish

the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that –

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter

shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions

thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of –

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party

will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall

certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.